BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The Opinion of the Circuit Court of Appeals is reported in *112 Fed. 2d. 462*, and is in the record at page 451. The opinions of the District Court are reported in *29 Fed. Supp.*, beginning at page 957 and will be found in the record beginning at page 387 and page 412.

II.

Jurisdiction.

Federal jurisdiction is based on diverse citizenship. The suit was brought in the District Court of Caddo Parish, Louisiana, and removed on petition of defendant to the United States District Court for the Western District of Louisiana (R. 18-19). An opinion was filed in that Court on January 17th, 1939 (R. 387-407). Petitions for rehearing were timely filed by defendant (R. 407) and by petitioner (R. 409). A new trial was granted on June 21st, 1939 (R. 411). Opinion on rehearing was filed on August 7th, 1939 (R. 412). Judgment against petitioner was entered on December 19th, 1939 (R. 417). Notice of appeal was given on December 26th, 1939 (R. 434) and the transcript was lodged in the Court of Appeals, Fifth Circuit, on March 7th, 1940. Judgment affirming the District Court was entered in the Circuit Court of Appeals on May 29th, 1940 (R. 463). Petition for rehearing was filed on June 17th, 1940 (R. 464) and denied July 8th, 1940 (R. 474).

Jurisdiction in this Court is based upon the contention that the decision of the Circuit Court of Appeals is in direct conflict with that of the Supreme Court of Louisiana in *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, 182 La. 439, 162 So. 37, construing the identical contracts under applicable Louisiana law.

III.

Statement of the Case.

On January 12th, 1917, Frost-Johnson Lumber Company (whose name in 1925 was, by charter amendment changed to Frost Lumber Industries, Inc.) and the Union Sawmill Company of Arkansas, an affiliated company, sold and conveyed to the Federal Petroleum Company of Louisiana, the defendant's author in title, an undivided one-half interest in the minerals under the lands described in plaintiff's petition, together with a like interest in the minerals in a large acreage located elsewhere in Louisiana and in Arkansas, owned by the vendors (R. 81-165).

On the same date (January 12th, 1917), a joint operating agreement was entered into by the parties, under which the parties provided for development by any one or all of them, of all or any part of the lands described in the contract of sale. (R. 199-222).

In October of 1917, the Union Sawmill Company, the record owner in fee simple of certain lands in said contracts located in the Parishes of Union and Ouachita, sold and conveyed the same to the Frost-Johnson Lumber Company. (R. 321-351).

On December 23rd, 1920, Frost-Johnson Lumber Company, the Union Sawmill Company, and the Federal Petroleum Company of Louisiana, jointly sold and conveyed to the Union Power Company, Inc., a Louisiana corporation, all the gas and gas rights under the lands embraced in the contract of date January 12th, 1917, heretofore referred to (R. 165-184), and the parties to the sale of gas, of date, December 23rd, 1920, entered into an operating agreement, which provided for development by the vendors in said sale of the lands described in said sale, for the minerals other than gas, and for development by the Union Power Company, Inc., of the lands embraced in said sale for the gas to be found therein. (R. 222-235).

On July 26th, 1926, the Union Power Company, Inc., sold and conveyed to the Interstate Natural Gas Company, Inc., the gas and gas rights under some 30,000 acres of land in the Parishes of Ouachita and Union, certain of which lands are included in the present suit. (R. 235).

The Frost Interests, and the Federal Petroleum Company of Louisiana joined in the instrument of sale from Union Power Company, Inc., to Interstate Natural Gas Company, Inc., of date, July 26th, 1926, for the purpose, among others, of agreeing to certain modifications in the operating contract of date December 23rd, 1920, had with the Union Power Company, Inc., insofar as that contract affected the lands described in the conveyance to the Interstate Natural Gas Company. It was also provided in the contract of sale of the gas and gas rights to the Interstate Natural Gas Company, that the provisions and stipulations of the operating contract of date, December

23rd, 1920, except to the extent modified, would remain in full force and effect (R. 235).

On March 31st, 1923, the Federal Petroleum Company of Louisiana transferred all of its rights in and to the properties acquired from the Frost Interests to the Federal Petroleum Company, a Delaware Corporation (R. 184).

This suit was instituted against the Federal Petroleum Company of Delaware to remove the cloud on the title of petitioner to certain lands in the Parishes of Union and Ouachita, Louisiana, arising from the claim of the Federal Petroleum Company of Delaware to one-half of the minerals other than gas in said lands based upon the foregoing instruments. Subsequent to the institution of the present suit, but before answer was filed, the Federal Petroleum Company of Delaware became merged with the Republic Production Company, a Delaware Corporation under the name of the Republic Production Company, and that Company, by answer made itself the defendant in this suit (R. 21).

Petitioner with respect to the claim of ownership asserted by the Republic Production Company to one-half of the minerals other than gas, averred that in Louisiana a sale of minerals creates a mineral servitude (*Wemple v. Nabors Oil & Gas Company*, 154 La. 483; 97 So. 666) and that its said lands were freed from the mineral servitude to which ownership is asserted by the defendant by the operation of the prescription, *liberandi causa*, of ten years non-use applicable to such servitudes (R. 295).

The case was tried upon an agreed statement of fact which shows that the lands in Union and Ouachita Parishes, with reference to which this suit is filed, form six separate and distinct blocks designated, for convenience sake, A, B, C, D, E, and F (R. 304, *et seq.*).

The agreed statement further shows that the Federal Petroleum Company, prior to December 23rd, 1920, the date of the sale of the gas and gas rights to the Union Power Company, completed *three gas wells* upon the properties involved in this litigation, all of them being upon the acreage in Block A, the first well being completed in June of 1918, the second on July 15th, 1919, and the third on October 11th, 1919. These three gas wells were conveyed to the Union Power Company, together with the gas rights in the sale from the Frost Interests and the Federal Petroleum Company to the Union Power Company of date December 23rd, 1920 (R. 165). The Union Power Company, *after acquiring the gas rights*, drilled and completed five gas wells upon lands in Block A, all of said wells being completed in the year 1924 (R. 308). It drilled and completed two gas wells upon the lands in Block C in 1924 and in 1924 it drilled and completed one gas well on Block D (R. 308-309).

After the Interstate Natural Gas Company, Inc., in July of 1926, *acquired the gas and gas rights* in and under a large part of the lands described in plaintiff's petition, it drilled and completed prior to the trial of this suit, upon acreage in Block A twenty-three gas wells (R. 309). Three of these gas wells were drilled and completed in the year 1929. The remaining twenty gas wells were drilled and completed in 1936 and 1937 (See paragraph 9 of the agreed

statement of fact, R. 309). The Interstate Natural Gas Company likewise drilled and completed in Block B three gas wells (R. 311). The first two of these wells were drilled and completed in 1929, and the last one in 1930. It drilled and completed in 1936 one gas well in Block D (R. 312). It drilled and completed in 1929 one gas well in Block E, and it drilled and completed one gas well in 1937 in Block F (R. 312).

The trial resulted in a judgment in favor of the Republic Production Company (as successor of Federal Petroleum Company of Delaware) overruling the plea of prescription of ten years non-use *(liberandi causa)* as to the lands in Blocks A, B, C, D and E, and decreed the Republic Production to be the owner of one-half the minerals other than gas in all the lands except those in Block F (R. 417).

This judgment was affirmed on appeal (R. 463).

IV.

Specification of Error.

The Circuit Court of Appeals (as did the District Court) erred:

(A): In holding that the deed of date December 23rd, 1920, executed by Frost Interests and the Federal Petroleum Company and conveying the gas to the Union Power Company (considered in connection with the operating agreement executed by all parties to said sale), was an assignment of an interest in the original mineral servitude in favor of the Federal Petroleum Company created in January of 1917 and not a dismemberment of said

original servitude, and that said deed and operating contract made in December of 1920 operated to protect, preserve and continue in existence the whole of said original servitude.

(B): In holding that the deed and operating contract executed in December of 1920 was an acknowledgment of the original servitude by the Frost Interests in favor of the Federal Petroleum Company sufficient to interrupt the liberative prescription running against the said servitude.

V.

Argument and Authorities.

In Louisiana, all servitudes are burdens imposed upon lands and are divided into two kinds: those established in favor of a person, and those established in favor of a landed estate. The first of these two servitudes is referred to as a personal servitude while the second is referred to as a real or predial servitude. *Civil Code 646.* Personal servitudes are likewise divided into two classes, one strictly personal which terminates with the life of him in whose favor it is established, the other passing by inheritance or contract to heirs or assigns. Of this last class, a sale or reservation of minerals is an ideal example.

In Louisiana, a reservation or sale of minerals does not vest title to specific minerals separate and distinct from the soil, but merely gives the right to explore the land and to capture and reduce to possession the mineral or minerals reserved, or sold, as may be found under and within the ground.

In the famous case of *Frost-Johnson Lumber Company v. Salling's Heirs*, 150 La. 756, 91 So. 207, the Supreme Court of Louisiana on second and final rehearing, as to the nature of the right reserved, on page 863 of the Louisiana Reports, said:

> "As to the nature of the right reserved, we liken it to the right to draw water from another's land; and that is a right of servitude. But we think it would be unprofitable to discuss generally whether such a right can or cannot be established in favor of a person and his heirs. For this much is certain, that many such grants and reservations of oil and mineral rights have been made in this state, whether under the name of leases or otherwise, and we will not disturb valuable rights, acquired in good faith and for valuable consideration, without being able to point out conclusively that such contracts are forbidden by law; and this, we confess, we are unable, as we are unwilling, to do.
>
> "We may hold, and we do hold, that no matter what the intention of the parties be, the owner of lands cannot convey or reserve the ownership of the oils, gases, and waters therein apart from the land in which they lie; and we so hold, because the owner himself has no absolute property in such oils, gases, and waters, but only the right to draw them through the soil and thereby become the owner of them. The intention of the parties has therefore nothing whatever to do with that holding; the principle involved being that no one can convey to another any greater right than he himself has.
>
> "But, in the matter of burdening his lands with some real obligation in favor of a person and his heirs, there is not the least doubt that the owners can do so unless some positive law prohibits it.
>
> "Now the right to establish a servitude in favor of a person and his heirs seems to be forbidden

by C. C. arts. 646, 709. But, on the other hand, it seems to be allowed by C. C. arts. 607, 758, 2013.

"And with these conflicting provisions before us we cannot say that the law clearly prohibits the creation of a servitude upon lands in favor of a person and his heirs. And hence the intention of the parties should govern in such matters.

"We therefore hold that the right granted or reserved in such cases is a servitude, and hence prescribed by nonuser for 10 years."

This decision has been cited and followed uniformly by the Supreme Court of Louisiana since its rendition to the present time in at least fifty different cases. Therefore, it may no longer be controverted in that state that the reservation or sale of minerals establishes a servitude upon the land described in the contract in favor of a person and his heirs, which is lost by nonuser over a period of ten years.

The parties to this suit, as did the District Court and the Circuit Court of Appeals, agree, that the sale and operating contract entered into in January of 1917, by the Frost Interests and the Federal Petroleum Company by which the latter acquired a half interest in the minerals, created in its favor a mineral servitude as to those lands situated in the State of Louisiana.

The differences of opinion lie with respect to the legal effect the joint sale of the gas, made by the Frost Interests and the Federal Petroleum Company to the Union Power Company in December of 1920, had, upon the mineral servitude created in January of 1917.

Petitioner contends that the said joint sale created a new (gas) servitude, and modified the original servitude by eliminating or removing therefrom the ~~sale.~~ gas

Defendant contends that the joint sale of the gas, insofar as respects the Federal Petroleum Company, was merely an assignment of an interest in its original servitude.

The agreed facts show there has been no development of the lands for the minerals by defendant or its predecessors in title within a period of ten years subsequent to the year 1919. The agreed facts further show that the Union Power Company and its assignee, the Interstate Natural Gas Company, have, since the former company purchased all of the gas, drilled numerous gas wells. If the sale of the gas by the Frost Interests and the Federal Petroleum Company to the Union Power Company in 1920 created a new (gas) servitude, then the drilling of gas wells by the Union Power Company and its assignee was merely an exercise of the gas servitude. On the other hand if no new (gas) servitude was created, but, as to the Federal Petroleum Company, the sale of the gas was merely an assignment of an interest in its original servitude, then the drilling of the gas wells inured to the benefit of that company and operated to interrupt the running of the liberative prescription of ten years non-use plead against its asserted claim to one-half of the minerals other than gas.

The main question, therefore, to be determined herein is this: Did the sale of the gas to the Union Power Company in December of 1920 create a new (gas) servitude? If so, the liberative prescription has operated to

free petitioner's lands of defendant's claim. If not, then the prescription has not run and defendant's claim is good.

The District Court and the Circuit Court of Appeals have both agreed with defendant and have held that no new (gas) servitude was created. In so holding said Courts have held directly contrary to the Supreme Court of Louisiana in a recent decision interpreting the same contracts.

In *Frost Lumber Industries, Inc., v. Union Power Company*, 162 So. 37, the same contracts before the Court of Appeals in this case were before the Supreme Court of Louisiana. With respect to the facts, the State Court said:

> "On January 12, 1917, the Frost-Johnson Lumber Company, now known as the Frost Lumber Industries, Inc., and the Union Saw Mill Company, *conveyed* to the Federal Petroleum Company an undivided one-half interest in all the minerals and mineral rights under certain lands of the vendors in the parishes of DeSoto, Sabine, Natchitoches, Ouachita, and Union. *On the same day the parties entered into a joint operating contract* providing for the development by any one of them of any part of the land conveyed.
>
> "On October 15th, 1917, the Union Saw Mill Company sold to the Frost-Johnson Lumber Company all the land then owned by the vendors in the parishes of Union and Ouachita. The deeds contain certain stipulations regarding the oil, gas, and mineral rights, and refer also to the former deed to the Federal Petroleum Company.
>
> "On December 23, 1920, the Frost-Johnson Lumber Company and the Federal Petroleum Company *sold* to the Union Power Company *all the gas* and gas rights under the land that is described in

> the mineral deed from the Frost-Johnson Lumber Company to the Federal Petroleum Company, *and on the same day the parties entered into an operating contract* providing for the development and production by them of the minerals respectively owned by each."

It is therefore clear that the sale and operating contract entered into with respect to the original servitude of one-half of the minerals and the sale and operating contract with respect to the gas, were before the State Court and considered by it in the *Union Power Company* case. It is also clear that the two deeds, together with the operating contracts, were considered by the State Court as the muniments of title under which the Union Power Company claimed to own the gas and gas rights on the lands involved in that litigation. This may not be disputed. In the State Court, the plaintiff, who is likewise the petitioner in this Court, brought suit for the purpose of obtaining a judgment cancelling and erasing from the public records the muniments of title under which the Union Power Company claimed the gas on certain of the lands embraced in the original sale. Against the defendant's claim in that case to the gas, the plaintiff filed a plea of ten years prescription, *liberandi causa.* The State Court then said:

> "Inasmuch as there has been no development *under the rights of servitude* acquired by the defendant on the lands of plaintiff, defendant's rights have become prescribed, unless the running of prescription has been interrupted by the documents on which the defendant relies. That is the sole question raised in the case."

Here is a positive statement by the State Court that the defendant in that case, the Union Power Company, had

acquired *a servitude* on the lands of plaintiff by virtue of the muniments of title it relied on, namely the deed and operating contract entered into in 1917 and the deed and operating contract entered into in 1920. It is to be noted that the word "servitude" used is in the singular number and not in the plural number.

The Circuit Court of Appeals, after tracing title to the gas based on these same instruments, with respect to the 1920 instruments (deed and operating contract) under which the Union Power Company acquired the gas, on pages 8 and 9 of its opinion (458 and 459 of the record) said:

> "But the instrument of conveyance was by no means all. There was in addition, an operating agreement which made it clear and plain that at no time was dismemberment intended but there was a direct and positive purpose to protect, preserve and continue the whole of the original servitude. The provisions for the drilling of oil wells by grantees [grantors][1] and of gas wells by grantors [grantees][1] with consequent obligations on and rights in each, put it beyond question, under the authorities appellee cites, particularly Patton v. Frost, 147 So. 33, that the original servitude was preserved for both oil and gas, not dismembered but intact, and that by the 1920 transfer, the owners of the original servitude and its servient estate merely made new means for their use and enjoyment."

In other words, the Court of Appeals holds that the instruments executed in 1920 were a mere assignment of an interest in the original servitude to the Union Power

[1] The words grantees and grantors as used by the Court of Appeals are obvious errors. We have inserted in brackets the correct word in each instance.

Company and did not dismember the said servitude into two servitudes, basing its finding largely upon the operating agreement made in connection with the conveyance of the gas and upon the case of *Patton v. Frost* which has no application as we shall later on point out.

In acquiring the gas it should be observed that the Union Power Company acquired all of the gas and gas rights in the lands described in the 1917 sale of a half interest in the minerals to the Federal Petroleum Company. The original sale *never embraced* more than a one-half interest in such rights. The gas and gas rights acquired by the Union Power Company in 1920, the State Court refers to and treats as a "servitude", a complete unit, not a partial one. It was with respect to this "servitude" that the State Court held that the liberative prescription had run. It is clear, therefore, that the decision by the Court of Appeals holding that the instruments executed in 1920 merely conveyed an interest in the original mineral servitude and preserved said original servitude for both oil and gas, intact, not dismembered, is directly opposed to the decision of the Supreme Court of Louisiana in the case *supra*, interpreting the same instruments.

In holding that the instruments in favor of the Union Power Company, executed by the Frost Interests, owner of the fee title, and by the Federal Petroleum Company, the owner of the servitude of one-half of the minerals with which the fee title was burdened, created a (new) servitude with respect to gas conveyed, the Supreme Court of Louisiana reached the only conclusion applicable under the articles of the Civil Code of Louisiana. As we have

heretofore pointed out, the Supreme Court of Louisiana in *Frost-Johnson Lumber Co. v. Sallings Heirs*, supra, classified the sale or reservation of minerals in land as a "personal" servitude. There are several kinds of personal servitudes under Louisiana law; usufruct is one of them. See *Civil Code 646*. In *Gayoso v. Arkansas*, 176 La. 333; 145 So. 677, and *Sample v. Whitaker*, 172 La. 722, 135 So. 38, the Supreme Court of Louisiana held that a sale, or reservation, of minerals was a servitude in favor of a person *in the nature of a limited usufruct.* With this classification in mind, a reference to codal articles dealing with "usufruct" and "servitude" is instructive. *Articles 600, 602, 605, 729, and 749* provide:

> "Art. 600. He (the owner) must neither interrupt nor in any way impede the usufructuary in the enjoyment of the usufruct, or in any manner impair his rights."
>
> "Art. 602. The owner of an estate subject to the usufruct, cannot create any new servitude thereon, unless it be done in such a manner as to be of no injury to the usufructuary."
>
> "Art. 605. The owner may mortgage, sell or alienate the thing subject to the usufruct, without the consent of the usufructuary, but he is prohibited from doing it in such circumstances, and under such conditions as may be injurious to the enjoyment of the usufructuary."
>
> "Art. 729. The right of imposing a servitude permanently on an estate belongs to the owner alone."
>
> "Art. 749. He whose estate is incumbered with a servitude, may impose on it other servitudes of any kind, provided they do not affect the rights of him who has acquired the first."

It will be noted from these articles that the owner of an estate burdened with a usufruct or with a servitude may impose other servitudes, provided the same does not affect the rights of him who has previously acquired a usufruct or a servitude. It will be further noted that the owner of an estate burdened with a usufruct or a servitude may create new servitudes provided it be done in such a manner as not to injure the existing usufruct or servitude. When, however, the owner of an estate burdened with a servitude or a usufruct *is joined by the owner of such real right*, then there is no reason why a new servitude may not be imposed upon the land; because the fee owner and the owner of the existing real right, whether it be a servitude or a usufruct, *together represent perfect ownership* of the land, and together may create a new and different servitude from that then existing on the property with absolute freedom.

In *Daggett on Mineral Rights in Louisiana, 1939 Ed.*, Section 68, page 217, it is said:

> "The naked owner (owner whose lands are burdened with a usufruct) of the land cannot sell the mineral rights, so as to create a servitude, 'unless it be done in such a manner as to be of no injury to the usufructuary.'" (Articles 600 and 602 of the Revised Civil Code are cited).
>
> "There would seem to be no good reason why the usufructuary and naked owner could not join in a sale or lease of the undeveloped mineral rights since between them exists perfect ownership of the land and each is specifically given the rights to alienate his holding subject to the other's rights." (Citing Articles 555 and 602 of the Revised Civil Code).

What is said by Daggett on Mineral Rights in Louisiana is expressly supported by a decision of the Supreme Court of Louisiana in *Superior Oil Producing Company v. Leckelt*, 189 La. 972, 181 So. 462, wherein the State Court said:

> "It is well established that a co-owner cannot place a burden on or use the common property without the consent of the co-owners. It is also well established that a servitude is indivisible.
>
> "* * * Under the provisions of these articles (referring to Articles 738, 739, 740, 741, 743 of the Civil Code) a co-owner could establish a servitude on the common property with the consent of the other co-owners. It cannot be disputed that a land owner can establish a servitude on his property by either ceding a part of his mineral interest or by reservation of a part of his mineral interest. * * * Hence, it is to be seen that the sale or reservation of a part of the mineral interest by the land owner is the establishment of a servitude. There is no reason why co-owners of common property, when they consent, cannot establish a servitude by the sale of a fractional interest of the mineral rights in the common property. For the same reason the sale by a co-owner of his fractional interest or a part of his fractional interest in the mineral rights in the common property would establish a servitude provided the co-owners consented. * * *"
>
> "An examination of the above-cited articles shows that they do not provide any particular form or manner by which the consent is given. * * * Under the provisions of the above-quoted articles of the Civil Code if the co-proprietors consent the servitude becomes established. * * *"

So when the State Court, with the contracts of 1917 and the contracts of 1920 before it in the *Union Power Company* case, refers to the rights acquired by the Union Power Company, as a "servitude", it was merely holding, that the Frost Interests, the fee owner of the lands, and the Federal Petroleum Company, the owner of the servitude with which the land was burdened, representing together perfect ownership, in conveying the gas rights to the Union Power Company, vested said company with a "servitude" as to the gas conveyed. The Court of Appeals and every Court which has been called upon to interpret the nature of the rights created by the instruments executed in 1917, has classified it as a mineral servitude of a one-half interest. The Supreme Court of Louisiana so held. See *Patton v. Frost*, 147 So. 33. Yet in the operating contract of 1917 executed by the parties, the Frost Interests, as vendors, with reference to development and production, reserved to themselves in the minerals conveyed, rights and privileges of the exact character retained by the vendors of the gas sold in 1920, and which were embodied in the operating contract executed in connection with said sale. The vendors in the sale of the gas to the Union Power Company in 1920 were the perfect owners of the land and all rights therein and pertaining thereto when the gas was sold. The situation, therefore, was exactly as it would have been, had the Frost Interests been the sole or perfect owners of the land and made the sale of the gas. Had the Frost Interests been sole owners and as such conveyed the gas, surely no one would have doubted that the Union Power Company thereby acquired a mineral servitude, operating contract or no operating contract. In what respect is the situation changed when the Frost Interests

and the Federal Petroleum Company, representing perfect ownership, execute the identical contracts? In joining in the execution of said contracts, Federal Petroleum Company, the holder of the original servitude, evidenced its consent to the imposition upon the servient estate of the gas servitude. Ordinary logic and the application of codal provisions lead to no other conclusion. *Superior Oil Producing Co. v. Leckelt*, cited supra. There is nothing illogical, therefore, in the State Court *finding*, in the *Union Power Company* case, that by the deed and operating contract executed in 1917, and by the deed and operating contract executed in 1920, the Union Power Company acquired a "servitude" with respect to the gas and that such servitude had been lost by non-use over a period of ten years. And it was logical for the Court to so hold in the absence of the Federal Petroleum Company as a party litigant in that suit, even though a mineral servitude in Louisiana is an indivisible right. We say this since it is clear that the State Court found that the Union Power Company had itself acquired a new and distinct servitude. Necessarily such finding implies that the Federal Petroleum Company, by joining in the deed and operating contract executed in favor of the Union Power Company, had consented to that company being granted a gas servitude upon the land. As the sole owner of this servitude, the Union Power Company was a proper party defendant in the State case. In joining to convey to the Union Power Company all of the gas by the instruments of 1920, the Federal Petroleum Company consented to a dismemberment of its original servitude and thereafter its original servitude embraced one-half of all the minerals other than gas.

Let us consider this matter from another angle. A mineral servitude in Louisiana is indivisible. See *Sample v. Whitaker*, 135 So. 38; *Clark v. Tensas Delta Land Co.*, 172 La. 913, 136 So. 1; *Holladay, et al., v. Darby*, 177 La. 297, 148 So. 55; *Civil Code Articles 656-657*. Therefore, all parties holding an interest in said servitude must be before the Court in a suit affecting the servitude, otherwise the Court could not render a valid judgment. It is apparent, therefore, that when the State Court in the *Union Power Company* case held the prescription plead to be good as against the gas rights claimed by the Union Power Company, it predicated its decision necessarily upon the premise that the Union Power Company was the sole owner of a gas servitude. If the sale of the gas merely conveyed an interest in the original mineral servitude created in 1917, then the necessary parties were not before the State Court and its decision was without effect. An indivisible right may not be cancelled in part. *Sample v. Whitaker*, supra.

As said in *Arizona v. California*, 298 U. S. 558, with Mr. Justice Stone speaking for the Court:

> "Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality."

And it is well to bear in mind in this connection what is said in *34 C. J.* Verbo, Judgments, *Section 794, page 502:*

> "Where a judgment is susceptible of two interpretations, the one will be adopted which renders

it the more reasonable, effective and conclusive, and which makes the judgment harmonize with the facts and law of the case and be such as ought to have been rendered. If possible, that construction will be adopted which will support the judgment, rather than one which will destroy it. * * * "

The contradictions in the opinions rendered by the District Court and by the Circuit Court of Appeals are clearly demonstrated by the decree rendered by the one and affirmed by the other. We find in the opinions of both Courts that mineral servitudes under Louisiana law are indivisible rights. We find each Court holding that the Union Power Company by the instruments of 1920 acquired only a right or interest in the original servitude. Then in the face of these two definite findings and rulings, the District Court sustained the plea of prescription with respect to the minerals claimed by defendant in the lands in Block F, a plea of prescription against one-half of the minerals other than gas, *notwithstanding, the owner of such gas interest was not before the Court;* and such action by the District Court is affirmed by the Court of Appeals. In other words, both the District Court and the Court of Appeals in sustaining the plea of prescription as to the lands in Block F against the asserted interest of defendant to one-half of the minerals other than gas, have each treated the original servitude as dismembered by the instruments executed in the sale of the gas in 1920; otherwise, in view of the original mineral servitude being indivisible, the owner of the gas rights would have had to be in Court along with the defendant for the plea of prescription against the original servitude to be successfully plead.

The Circuit Court of Appeals beginning at the bottom of page 10 of its opinion and continuing on page 11 (R. 460-461) further said:

> "In the State case (referring to the Union Power Company case) while it is true that it was held that the December 23rd, 1920 transfer to Union was not a sufficient acknowledgment as to the lands in that suit, it was pointed out in the opinion that this was so because 'On reviewing the evidence offered on the trial of the case, we find that the various documents on which defendant relies for the interruption of the prescription pleaded by the plaintiff, do not describe any of the lands involved in this case. All the documents, with a few exceptions, refer only to lands situated in the Parishes of Ouachita or Union."

A mere reading of the language quoted by the Court of Appeals from the State case shows that the State Court was not referring to the December 23, 1920, instruments transferring the gas rights to the Union Power Company. Both the Court of Appeals in this case and the State Court, in the *Union Power Company* case, found that the transfer to the Union Power Company made in December of 1920 conveyed the gas rights *under the same lands* described in the mineral deed from the Frost Interests to the Federal Petroleum Company in January of 1917. The lands described in the deed from the Frost Interests to the Federal Petroleum Company in 1917 and the lands described in the deed executed by said parties as vendors to the Union Power Company in 1920 described lands in the Parishes of DeSoto, Sabine, Natchitoches, Ouachita and Union including the lands in DeSoto and Sabine Parishes which were involved in the *Union Power Company* suit in the

State Court. When, therefore, the State Court in the language quoted by the Court of Appeals, says:

> "On reviewing the evidence offered on the trial of the case, we find that the various documents on which defendant relies for the interruption of prescription created by the plaintiff, do not describe any of the lands in this case,"

it is clear that the documents by which the gas is conveyed to the Union Power Company are not among the documents referred to by the State Court.

If the various documents "on which defendant relies", as stated by the State Court, did not describe any of the lands involved in the *Union Power Company* case in that Court, then the documents "relied on" could not have included the deed and operating contract executed in December of 1920 under which the gas and gas rights conveyed to the Union Power Company, because these instruments *did describe* the lands involved in the *Union Power Company* suit.

The law of Louisiana with respect to the interruption of prescription by acknowledgment is clearly set forth in *Hightower v. Maritzky*, 195 So. 518, decided by the Supreme Court of Louisiana on April 1st, 1940. In that case the Court, speaking through Mr. Chief Justice O'Niell, said:

> "In order for an acknowledgment by a landowner that his land is subject to certain mineral rights in favor of a person named in the acknowledgment to have the effect of interrupting the prescription by which such rights are extinguished the intention that the acknowledgment shall have that effect *must be expressed in unmistakable terms.*"

One of the cases cited by the Supreme Court of Louisiana as authority for the statement quoted above is *Frost Lumber Industries, Inc., v. Union Power Company*, supra. In that case the State Court with reference to an acknowledgment interrupting prescription said:

> "As we have seen, therefore, each of the above-mentioned cases announces the principle that a specific acknowledgment of a prior reservation of mineral rights is not of itself sufficient to interrupt the running of prescription; that something more is required for that purpose *than the mere acknowledgment of the existence of such rights in a third person. As pointed out in the Lewis case, there must be coupled with the acknowledgment the purpose and intention of the party making the acknowledgment to interrupt the prescription then accruing.*"

An examination of the deed (R. 165) and the operating contract (R. 222) conveying the sale of the gas in December of 1920 shows that the preamble to the deed (R. 166) contains a recitation that the Frost Interests and the Federal Petroleum Company, vendors of the gas, each owned a one-half interest in the minerals in the lands in which the Union Power Company acquired the gas. This was a simple recital of a fact then existing; and a mere acknowledgment of an existing right in minerals was not sufficient to interrupt the prescription then accruing. Authorities *supra*. There is nothing in the deed and operating contract conveying the gas which "expresses in unmistakable terms," an intention to interrupt the prescription. It follows that the Court of Appeals erred in so holding.

Defendant relies on drilling of gas wells by the Union Power Company and its assignee, the Interstate

Natural Gas Company to evidence development of the minerals *other than gas*, the ownership of which is claimed by the defendant. But this is true only if the Union Power Company acquired in December of 1920 an interest in the original servitude. It is not true if the Union Power Company acquired an independent gas servitude. In the *Union Power Company* case the Supreme Court of Louisiana held it acquired such a servitude.

Defendant further relies on the recital of ownership of the minerals in the deed to the gas conveyed in December of 1920 as an acknowledgment to interrupt prescription. Measured by the jurisprudence cited *supra*, it is clear the deed did not have this effect.

We accordingly submit the Court of Appeals has, on both propositions, held counter to the Supreme Court of Louisiana interpreting local law.

The fact that the defendant, in 1936, after the prescription had run, over the protest of petitioner, drilled two wells (R. 313-4, pars. XII and XIII) in no wise affected the rights of the parties. Such acts on the part of the defendant were wholly vain. *La Del Oil Properties v. Magnolia Petroleum Company*, 169 La. 1137, 126 So. 684.

Appellee in its opposition to petitioner's application for rehearing in the Court of Appeals, page 472 of the Record, says:

> "Appellant again ignores the cases of Patton v. Frost Lumber Industries Inc., et al., and McLeod v. Frost Lumber Industries Inc., et al. (147 So. 33). These cases have already been cited and discussed in our original brief and anything further we might say would simply constitute a repetition of what has

already been urged. Suffice it to say that those cases involve some of the same land which is involved in the present suit (land located in Block A, upon which development had taken place and from which gas is being produced) and involve the same conveyances and joint operating contracts with which we are concerned in the present suit. In said cases, the Supreme Court of the State of Louisiana held that the drilling of gas wells and the withdrawal of gas therefrom by the Union Power Company, Inc., and subsequently by Interstate Natural Gas Company, Incorporated, constituted an exercise and user of the servitude originally created in favor of Federal Petroleum Company by the instruments dated January 12th, 1917, and effectively preserved such servitude in its entirety."

A careful reading of the consolidated case clearly shows that it does not support appellee's contention and while it is cited by the Court of Appeals as authority therefor, we submit it does not support its conclusion that the sale of the gas in December of 1920 by the Frost Interests (fee owners) and by the Federal Petroleum Company (a servitude owner), was as to the latter company merely an assignment of an interest in the pre-existing servitude.

Any conclusion that petitioner may draw from the case of *Patton v. Frost Lumber Industries* (147 So. 33) may be looked upon as being more or less a prejudiced conclusion. It is fortunate therefore, that we have the conclusion of a recognized authority with reference to the case and as to what the Supreme Court of Louisiana held therein. *Daggett on Mineral Rights in Louisiana*, page 71, with reference to that case says:

"The case of Patton v. Frost Lumber Industries, decided in 1933, logically lays down the addi-

tional principle that an original grantor of a single servitude cannot subsequently create separate servitudes by selling portions of the original tract. In this case, the Frost-Johnson Lumber Co. created a servitude on a continuous area of 30,000 acres. Later the Lumber Company sold portions of the land to plaintiffs. There was no development of plaintiffs' tracts during the ten-year term after their purchase and possession; therefore, they raised the issue that by virtue of the dismemberment of the original tract there had been dismemberment of the original servitude and hence loss of the right on the undeveloped tracts which they held. The Court held that 'servitudes whether of this nature or not, are charges or incumbrances which follow the land into whatever hands it may go.' The following excerpt is a clear exposition of the principle:

> 'There was but one tract of land and but one servitude. The establishment of that servitude by the owner of the tract in favor of the Federal Petroleum Company vested in it and its assigns the right to explore every acre of the land for minerals. Being the owner in fee, Frost-Johnson Lumber Company had the right, of course, to thereafter divide its lands into as many tracts as it saw fit. But, the servitude having been created and having already attached to all the lands, it was then beyond its power to dismember the servitude itself. The sale of the land to plaintiffs did not have the effect of creating new or additional servitudes covering the separate tracts. The servitude originally created by Frost-Johnson was an incumbrance on the entire tract when it sold to plaintiffs. It incumbered and bound the entire tract like a mortgage or a lease.' "

It may not be controverted that the Federal Petroleum Company, the owner of a servitude in the lands sold

in the *Patton* case, *did not join* in or have anything to do with the sales of land made by the Lumber Company to Patton and to McLeod, the plaintiffs in the consolidated case. As the Federal Petroleum Company did not join in the sale of the land by the Lumber Company to said plaintiffs, or prior to said sales or thereafter, consent thereto,—the Lumber Company was powerless to create a *new servitude* conflicting with the prior servitude on the lands conveyed by it to said plaintiffs. The situation, however, would have been altogether different had the Federal Petroleum Company, owner of the original servitude, joined with the Lumber Company, the owner of the land, in making the sales of land to the plaintiffs; for then the vendors would have represented perfect ownership and therefore could create separate servitudes. The Lumber Company *alone* and without the consent of the Federal Petroleum Company, the owner of the original servitude, could not dismember that servitude. And that is what the Supreme Court of Louisiana held in the *Patton* case as clearly shown by the excerpt therefrom quoted in *Daggett on Mineral Rights*, supra, wherein that Court said:

> "But, the servitude, having been created and having already attached to all the lands, it was then beyond its power to dismember the servitude itself."

As shown by the statement of the Court, the Lumber Company sold the lands to the plaintiffs in the *Patton* case in 1918 and 1919, months before the sale of the gas to the Union Power Company in December of 1920. When the gas was sold to the Union Power Company in December of 1920, the Frost Interests did not own the lands sold to plaintiffs in the *Patton* case; consequently *as to the lands* previously sold to said plaintiffs, the Frost Interests in

December of 1920 could not create a servitude. Only Patton and McLeod, the owners of the land, could do this.

We submit that the decision of the Supreme Court of Louisiana in the *Patton* case does not support appellee's contention nor the conclusion of the Court of Appeals in support of which it is cited, but is implied authority for the contention of petitioner herein; namely, that where the owner of land and the owner of a servitude thereon, *join* in conveying minerals to a third person, that a new and separate servitude is thereby created, for the vendors in such a sale represent perfect ownership.

We further submit that the opinion rendered by the Court of Appeals in this case is in direct conflict with the opinion and ruling of the Supreme Court of Louisiana interpreting the same contracts in *Frost Lumber Industries, Inc., v. Union Power Company, Inc.*, 162 So. 37; that under the decision of this Court in *Erie v. Tompkins*, 304 U. S. 64, the interpretation, express and implied, placed upon said contracts by the State Court in the *Union Power Company* case, with respect to local law is binding upon Federal Courts and that therefore, the opinion and decree rendered by the Court of Appeals interpreting said contracts in conflict with the interpretation of the Supreme Court of Louisiana in the *Union Power Company* case is erroneous, and should be reversed.

Respectfully submitted,

SIDNEY L. HEROLD,
ELMO P. LEE,
Attorneys for Petitioner,
Shreveport, Louisiana.